BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1. OPINION OF COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Eighth Circuit has not yet been reported, but will be found on pages 29 to 41 of the Record herein.

2. JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 USCA, Sec. 347).

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court dismissing petitioner's amended petition was rendered July 27, 1944 (Rec., p. 42) and a petition for a rehearing was denied on August 23, 1944 (Rec., p. 71). Thirty days stay of mandate was granted by the Court of Appeals on September 2, 1944 (Rec., p. 71).

The following cases are believed to sustain the jurisdiction of this court:

Helvering v. Oregon Mutual Life Ins. Co., 311 U. S. 267, 268, 85 L. Ed. 180;

United States v. Chicago, Milwaukee & St. Paul, 312 U. S. 592, 593, 85 L. Ed. 180;

Reconstruction Finance Corporation v. Bankers Trust Co., 318 U. S. 163, 166, 87 L. Ed. 680;

Helvering v. American Dental Co., 318 U. S. 322, 325, 87 L. Ed. 785;

Clearfield Trust Co. v. United States, 318 U. S. 363, 366, 87 L. Ed. 838;

Corn Exchange National Bank & Trust Co. v. Klauder, 318 U. S. 434, 435, 87 L. Ed. 884;

Carter v. Kuhler, 320 U. S. 243, 246, 88 L. Ed. 13;

Merchants National Bank of Boston v. Commissioner of Internal Revenue, 320 U. S. 256, 259, 88 L. Ed. 55;

Atlantic Refining Co. v. Moller, 320 U. S. 462, 464, 88 L. Ed. 201.

3. STATEMENT OF CASE.

In the petition for the writ herein is a statement of the case so far as is material to the consideration of the questions presented and, in the interest of brevity, a statement of the case is not repeated here.

4. SPECIFICATION OF ERRORS.

Petitioner assigns the following errors for a reversal of the judgment of the Court of Appeals:

(1) The Court of Appeals erred in holding that the agreement of Edward F. Goltra in the contract of May 6, 1932 to apply a certain portion of the proceeds of any judgment recovered by him on his claim against the United States to the purchase of all, or a portion, of the bonds of the Mississippi Valley Trust Company owned by petitioner did not give petitioner an equitable lien in the proceeds of the judgment recovered by Edward F. Goltra on his claim against the United States.

This holding is contrary to, and in conflict with, the holding of this Court in Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301; In re Paschal, 10 Wall. 483, 19 L. Ed. 992, and Valdes v. Larrinaga, 233 U. S. 705, 58 L. Ed. 1163, and is likewise contrary to the holding of the United States Circuit Courts of Appeal in McCormack v. Harrah (App., D. C.), 51 F. 2d 316; Wardman v. Leopold (App., D. C.), 85 F. 2d 277; Mitchell v. Bowman (C. C. A. 10), 123 F. 2d 445; In re Interborough Consol. Corp. (C. C. A. 2), 288 F. 334; Walker

v. Hartford Realization Co. (C. C. A. 2), 74 F. 2d 756, and American Surety Co. v. Finletter (C. C. A. 3), 274 F. 152.

(2) The Court of Appeals erred in holding that the contract of May 6, 1932 between Edward F. Goltra and petitioner involved a hazard or gamble and savored of champerty under the Missouri law and precluded the granting of equitable relief to petitioner in the Federal Court.

This holding is contrary to and in conflict with the Missouri law as announced and declared by the Missouri Supreme Court in Curry v. Dahlberg, 341 Mo. 897, 110 S. W. (2d) 742; DePass v. B. Harris Wool Co., 346 Mo. 1038, 144 S. W. (2d) 146, and is also contrary to and in conflict with the holding of the Circuit Court of Appeals for the District of Columbia in Gesellschaft v. Brown, 78 F. 2d 410, and Wardman v. Leapold, 85 F. 2d 277.

ARGUMENT.

I.

Equitable Lien.

In his contract of May 6, 1932 Edward F. Goltra agreed that in the event he was successful in his claim against the United States and should recover a final judgment therein, he would on payment thereof, after deducting the legitimate costs of such litigation, including counsel fees, "apply the proceeds remaining in the purchase from the party of the second part of the bonds of the Mississippi Valley Iron Company, of which it is the owner at par * * * in the following proportions:

> "If the proceeds remaining shall be less than $150,000, one-third (⅓) of such amount **shall be applied** to such purchase; in the event the proceeds remaining shall be in excess of $150,000 and less than $250,000, then of such excess **I agree to apply** forty (40%) per centum in addition to the purchase of said bonds; in the event the proceeds remaining shall exceed $250,000 and be less than $350,000, then of such excess **I agree to apply** fifty (50%) per centum in addition to the purchase of such bonds, and finally in the event the net recovery should exceed $350,000 I agree to purchase all of the bonds of said Mississippi Valley Iron Company owned by the party of the second part" (R. 13).

The amended petition alleges (R. 4, 8-9) that the net proceeds of the judgment received by Goltra's executors on Goltra's claim and suit against the United States amounted to $281,415 and that under the terms of the contract of May 6, 1932, Goltra's executors were obligated to apply $105,707 of that amount to the purchase of petitioner's bonds in an equivalent amount which they had declined to do.

Notwithstanding Goltra's agreement in this contract that he would, upon the payment to him of any judgment which he might recover on his claim against the United States, **apply** a certain portion of the net proceeds thereof to the purchase of an equivalent amount of the bonds of the Mississippi Valley Iron Company owned by petitioner, the Court of Appeals held (R. 38) that petitioner did not under that contract acquire an equitable lien on the net proceeds of that judgment to the extent of $105,707, or in any amount, for the purchase or acquisition of petitioner's bonds of an equivalent amount. This holding is, we submit, in conflict with the prior holding of this Court and also with the holding of the Courts of Appeal in other circuits.

In Wylie v. Coxe, 15 How. 415, 420, 14 L. Ed. 301, the court held that an agreement to pay an agent 5 per cent of the amount which should be recovered under a claim against the Mexican Government gave the agent an equitable lien on the fund to that extent, and said:

> "The evidence proves that the complainant was to receive a contingent fee of five per centum, out of the fund awarded, whether money or script. This being the contract, it constituted a lien upon the fund, whether it should be money or scrip. The fund was looked to, and not the personal responsibility of the owner of the claim. A bill filed under the act would have authorized an injunction for the amount claimed, by complainant. Such a procedure would be within the act. But under the contract the lien on the fund in the hands of the administrator is a sufficient ground for an equity jurisdiction."

In Ingersoll v. Coram, 211 U. S. 335, 367, 53 L. Ed. 208, the court held that a contract by one of the contestants of a will to pay an attorney for his services $100,000 out of the funds realized by the contestant from the estate of

the deceased if the will contest was successful created an equitable lien in favor of the attorney on the funds so realized by the successful contestant, and said:

"The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the Circuit Court upon the argument of the demurrer. However, the court said that 'upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to on behalf of Mr. Ingersoll.' On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying: 'Whether or not the particular agreement creates a lien is a matter of construction. In this case the fact that there was no primary personal responsibility of J. A. Coram specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer and proofs, the bill must be sustained.' **This conclusion of the court is sustained by authority.** In **Wylie v. Coxe**, 15 How. 415, a contract was made with an attorney for the prosecution of a claim against Mexico **to pay him a contingent fee** of five per cent out of the fund awarded. It was held that the agreement constituted a lien upon the fund.

"In In re Paschal, 10 Wall. 483, in the letter retaining Paschal it was said that his compensation would depend upon the action of a future legislature, 'unless a recovery is had in the suit, in which event I shall feel authorized to **let you retain it out of the amount received.**' It was held that in accordance with the **prevailing rule** in this country Paschal had a lien on the fund in his hands for disbursement and professional fees. The case was cited in McPherson v. Cox, 96 U. S. 404, 417, and the doctrine repeated. See also Central Railroad v. Pettus, 113 U. S. 116; Louisville etc. Railroad Co. v. Wilson, 138 U. S. 501, 507. In Walker v. Brown, 165 U. S. 654, it was held that **every**

express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular, real or personal, or fund, therein described or identified, **a security for a debt** or other obligations, **creates an equitable lien** on the property so indicated. This was an application of the doctrine of Fourth Street Bank v. Yardley, 165 U. S. 634, and Ketchum v. St. Louis, 101 U. S. 306. These cases are not opposed by Trust v. Child, 21 Wall. 441, and Wright v. Ellison, 1 Wall. 16. In the latter case it is said that it is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the debtor should be paid out of it. **These conditions are satisfied in the case at bar.**''

In Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530, Barnes, an attorney, was employed to prosecute a mining claim under an agreement to pay him one-fourth of all that should be recovered in the suits on those claims. Barnes employed the plaintiff, Alexander, an attorney, to assist him in those suits, and agreed to pay him, in the event of success, one-third of the fee which Barnes should receive. The court held under this agreement that Alexander had an equitable lien on one-third of the fee received by Barnes as the result of those suits. Mr. Justice Holmes, speaking for the court in that case, said, l. c. 119-120:

> ''The whole matter rests on conversations, in one of which Barnes said to Street and Alexander, 'if you will attend to this case I will give one one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanniger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.' In others also he explained what his firm was to have and told Street and Alexander that they should get one-third of that if they would do certain work that he had not time to attend to. Street and Alexander did the work required, it does not matter

whether it was more or less;—there was some attempt to raise a question about the fact, but we regard it as beyond dispute. The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gave them no specific claim against the fund. For this proposition reliance is placed upon Trist v. Child, 21 Wall. 441. In that case Child had an agreement with Trist that Child should take charge of a claim of Trist before Congress and should receive twenty-five per cent. of whatever sum Congress might allow. The suit alleged a lien on the sum allowed and prayed that Trist might be enjoined from withdrawing the money from the Treasury and might be decreed to pay the amount due. The bill was dismissed on the ground that the contract was illegal, but it was added that Child had no lien because it was forbidden by act of Congress, and also, it was said, because there was no sufficient appropriation of the fund, so that the only remedy, if there had been one, would have been at law. (Wright v. Ellison, 1 Wall. 16; Christmas v. Russell, 14 Wall. 69.) This decision, so far as it concerns us here, seems to have overlooked Wylie v. Coxe, 15 How. 415, which decided that a contract for a contingent fee out of a fund awarded constituted a lien upon the fund. The remarks in Trist v. Child were not necessary to the decision, which was placed mainly on other grounds, so that at least we are warranted in treating the question as at large. * * *

(l. c. 121) "Obviously the only thing intended or desired was to give the appellees a claim to one-third of the fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes unless discharged to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but

the important thing is not whether they used the present or the future tense but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it. See National City Bank v. Hotchkiss, 231 U. S. 50, 57. He promised only that if, when and as soon as he should receive an identified fund one-third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right. Sharington v. Strotton, Plowden, 298, 308. Hogan v. Barry, 143 Massachusetts 538. Ladd v. Boston, 151 Massachusetts 585, 588. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. Mornington v. Keane, 2 DeG. & J. 292, 313. Holroyd v. Marshall, 10 H. L. C. 191, 211.

"The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the principle not only of Wylie v. Coxe, supra, but of Ingersoll v. Coram, 211 U. S. 335, 365-368, which cites it in later cases. See further to the same point, Burn v. Carvalho, 4 My. & Cr. 690, 702, 703. Rodick v. Gandell, 1 DeG., M. & G. 763, 777, 778. Harwood v. La Grange, 137 N. Y. 538, 540. It is suggested that there is an American doctrine opposed to that which is established in England. We know of no such opposition. There is or ought to be but one rule, that suggested by plain good sense."

In Valdes v. Larrinaga, 233 U. S. 705, 709, 58 L. Ed. 1163, the court held that a contract under which one of

the contracting parties was to receive a 10 per cent interest in the profits of a water franchise for helping to secure it and for assisting in the plans therefor, gave him an equitable lien in the profits derived from the concession and said:

> "It is objected in the first place that the case is not one for equitable relief. But whether the contract created a partnership * * * or not * * * it gave the appellee an **equitable interest** in the concession to the extent of securing his share of the profits, if any, and attached to those profits specifically if and when they came into being. Barnes v. Alexander, 232 U. S. 117, 121."

In McCormack v. Harrah (App. D. C.), 51 F. (2d) 316, it was held that the contingent fee contract of an engineer who was employed to make an investigation and surveys in connection with a claim against the Cuban government created an equitable lien in favor of the engineer on the amount realized on such claim.

In Wardman v. Leopold (App. D. C.), 85 F. (2d) 277, the court held that a contingent fee contract of tax experts, who were not lawyers, for a certain percentage of all tax refunds which they obtained for a taxpayer created an equitable lien in favor of these tax experts in such refunds. The court said (l. c. 281):

> "Thus it would seem that on the question of whether or not an equitable lien is created upon the fund under the circumstances detailed in the present case, **it is immaterial whether** it be for an attorney's fee, as in the Barnes (232 U. S. 117) and Ingersoll (211 U. S. 335) cases; or for the fee of an engineer, as in the Harrah case (51 F. [2d] 316); or the fee of tax specialists, as in the instant case."

In Mitchell v. Bowman (C. C. A. 10), 123 F. (2d) 445, one Mitchell entered into a contract with Jones, an archi-

tect, under which Jones agreed to pay Mitchell two-thirds of all fees which he should receive for architectural services under all municipal contracts which should be secured for him by Mitchell. The court held that under that contract Mitchell had an equitable lien on all architectural fees received by Jones in connection with such contracts for his two-thirds interest therein. The court said (l. c. 447):

> "The fund was not in existence at the time of the execution of the contract; and, in a strictly technical sense, the lien could not attach until the fund came into being. But when the fund actually became existent, the lien immediately attached and related back to the time of the execution of the contract."

In In re Interborough Consol. Corporation (C. C. A. 2), 288 F. 334, 349, the court held that a promise to pay out of a particular fund created a lien on the fund and said:

> "But it is now definitely settled in the federal courts that a promise to pay out of a particular fund creates a lien on the fund, which attaches to the fund when it comes into existence and which equity will enforce, holding the promisor to be a trustee as soon as he gets title. Barnes v. Alexander, 232 U. S. 117, 120, 34 Sup. Ct. 276, 58 L. Ed. 530.
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> "A contract whereby a contracting party sufficiently indicates an intention to make some particular property or fund which it describes a security for a debt or other obligations creates an equitable lien on the property so indicated. Ingersoll v. Coram, 211 U. S. 335, 368, 29 Sup. Ct. 92, 53 L. Ed. 208. A contract which shows an intention to charge a particular property therein identified with an obligation creates an equitable lien thereon. Houselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740. And if a party by agreement creates a charge or claim in the nature of a lien on property of which he is the owner or in possession,

a court of equity will establish and enforce it, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take with notice. Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865."

In Walker v. Hartford Realization Co. (C. C. A. 2), 74 F. (2d) 56, the court held that an agreement to pay a claim out of a particular fund created an equitable lien, although it was recognized that prior to Barnes v. Alexander, 232 U. S. 117, there was a conflict in the federal cases whether a promise to pay out of a particular fund created an equitable lien in the fund, but that in the Barnes case the court had definitely resolved that conflict in favor of an equitable lien under such a promise. The court in that connection said (l. c. 57):

"It is argued that such an agreement does not create a lien, but the decision of the Supreme Court in Barnes v. Alexander, 232 U. S. 117, seems precisely in point and sustains complainant's position. There Barnes said to Alexander: 'If you will attend to this case I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger & Marks.' Justice Holmes remarked in the course of his opinion that: 'The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien.' He cited in support of this conclusion: Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753; Ingersoll v. Coram, 211 U. S. 335, 365-368, 53 L. Ed. 208; Burn v. Carvalho, 4 My. & Cr. 690, 702, 703; Rodick v. Gandell, 1 DeG. M. & G. 763, 777, and Harwood v. LaGrange, 137 N. Y. 538, 540, 32 N. E. 1000, all of which indicate that an agreement to pay out of an identifiable fund when it shall come into being gives rise to a lien. To the New York decision may be added the recent case of Archibald v. Panagoulopoulos, 233 N. Y. 478, 135 N. E. 857; Wilson v. Seeker, 72 N. J. Eq. 523, 66 A. 909; Geddes v. Reeves

Coal & Dock Co. (C. C. A. 8), 20 F. 2d 48, 54 A. L. R. 282; U. S. Fidelity & Guaranty Co. v. Bristow (D. C.), 4 F. 2d 810, and American Surety Co. v. Finletter (C. C. A.), 274 Fed. 152, are in accord.

"There are authorities holding that an equitable lien will only be imposed where there is an agreement to assign a fund present or future. Such are Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Christmas v. Russell, 14 Wall. 69; Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555; Palmer v. Carey (1926), A. C. 703; Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314, but we think in so far as these may be said to differ from Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530, we are bound by the latter."

In American Surety Co. v. Finletter (C. C. A. 3), 274 Fed. 152, the court held that the following provision of a contract for a public work created an equitable lien in favor of the surety as against general creditors of the contractor:

"Deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or material supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon said surety by reason of its suretyship as aforesaid."

And in answer to the contention that under the holding in Christmas v. Russell, 14 Wall. 69, the foregoing provision did not create an equitable lien, the court said (l. c. 156):

"The case of Christmas v. Russell turned mainly, if not entirely, upon a question of jurisdiction. Without discussing the views there expressed with reference to a valid equitable assignment, we are inclined rather to the views of the same court expressed in

Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208, accepting the rule stated in Walker v. Brown, 165 U. S. 654, 41 L. Ed. 865, to the effect that an express executory contract in writing, whereby the contracting parties sufficiently **indicate an intention to make some particular property or fund therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated.** Barnes v. Alexander, 232 U. S. 117, 120, 121, 58 L. Ed. 530; Hurley v. Ashbridge, 55 Pa. Super. Ct. 523, 526, 527; Stehle v. United Surety Co., 107 Md. 470, 68 Atl. 600."

The Court of Appeals, while apparently recognizing the analogy of the Ingersoll and Barnes cases, supra, to the case at bar, nevertheless held that the contingent fee contract of an attorney on the right to an equitable lien is distinguishable from other contracts because the services of the attorney helps to bring the particular fund into existence. Clearly this is not a sound or reasonable differentiation, because the sum of $5,000 which petitioner paid to Mr. Goltra to assist him in meeting the expenses necessary to secure the required authorization of Congress for the institution of his claim or action against the United States and in defraying the expenses of the suit on that claim after it had been authorized, likewise helped to bring the fund into existence. In other words, what an attorney helps to create by his personal efforts petitioner in this instance helped to create by its money. We submit, therefore, that because in the one instance the claimant happens to be an attorney and in the other instance a layman can make no difference on the right to an equitable lien on the fund which the plaintiff in the one instance helps to create by his personal service and in the other instance by an expenditure of his personal funds. Furthermore, neither this Court nor the Federal Courts of Appeal have in cases which did not involve contingent fee con-

tracts of attorneys have made any such distinction on the right to an equitable lien on the fund.

The Court of Appeals, in support of its holding that the contract of May 6, 1932 did not create an equitable lien in favor of petitioner in the proceeds of the judgment recovered by Goltra against the United States, relies upon Union Trust Co. of Maryland v. Townshend (C. C. A. 4), 101 F. 2d 903, and Lone Star Cement Corp. v. Swartwout, 93 F. 2d 767, decided by the Circuit Court of Appeals for the Fourth Circuit.

In the Swartwout case the court held that a promise of a debtor to pay a debt out of the proceeds realized from the sale of certain property did not create a lien in favor of the creditor on the fund. This holding was based on the holding in Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762, which this court in the Barnes case, supra, declined to follow because the court in the Christmas case had overlooked its prior and contrary holding in Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301.

The holding of the majority of the Court of Appeals for the Fourth Circuit in the Townshend case, supra, is not in point because it was held in that case that an agreement on the part of a debtor that the proceeds of the sale of certain property should be paid to a third person and that when so paid the fund should be applied to the payment of a debt **did** create an equitable lien in favor of the debtor upon the proceeds realized upon the sale of the property. Judge Soper dissented in the Townshend case on the ground that the agreement in that case was merely one for the payment of a debt out of a particular fund and that under the previous holding in the Swartwout case this did not give the debtor an equitable lien on the fund. However, Judge Soper in his dissenting opinion in the Townshend case, recognized that there was a conflict in the decisions of this court on this question and in that connection said (101 F. 2d, l. c. 916):

"It is therefore important to note that even if the federal courts have broadened the strict requirements of Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762 (see B. Kuppenheimer & Co. v. Mornin, 8 Cir., 78 F. 2d 261, 264, 101 A. L. R. 75), such is not the case with the Supreme Court of West Virginia. That court has recently refused to follow such decisions as Barnes v. Alexander, 232 U. S. 117, 34 S. Ct. 276, 58 L. Ed. 530, insofar as they may seem to depart from the earlier rule, as is shown by the following quotation from Arnold v. Buckhannon Bank, 116 W. Va. 589, 183 S. E. 52. In that case the court was called on to pass upon the claim of a creditor to prior payment out of a designated fund. The plaintiff had lent money to a bank to be applied to the payment of interest on notes for which he was not responsible; and the bank agreed to repay him the advances out of the first money it received on the notes from the makers, or from a sale of the makers' property. The court held that this was a mere agreement that the debt should be paid out of a designated fund when received by the debtor and was not an assignment of and created no equitable right to the fund. Commenting on the differences on the subject that have arisen in the federal courts, the Supreme Court of West Virginia had this to say: 'There is some difference of authority on a situation like this, occasioned mainly by the fluctuation thereon of the federal courts.' For demonstration of this statement, see the several holdings in Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762; In re Stiger (D. C.), 202 F. 791; Barnes v. Alexander, 232 U. S. 117, 34 S. Ct. 276, 58 L. Ed. 530; In re Interborough Consol. Corp. (C. C. A.), 288 F. 334, 32 A. L. R. 932; East Side Packing Co. v. Fahy Market (C. C. A.), 24 F. 2d 644. The Virginia courts, however, are committed to the rule that to constitute an equitable assignment, the debtor must by order or otherwise place the creditor in position to compel payment of the debt from the holder of the fund; and that a mere agreement

between debtor and creditor that the debt should be paid out of a designated fund, when received by the debtor, is not an assignment of and creates no equitable right to the fund."

II.

Champerty.

The Court of Appeals in holding that the contract of May 6, 1932, was a gambling contract and savored of the character of maintenance, and was therefore unenforceable under the Missouri law, and consequently could not be enforced by a Federal court of Missouri, ruled the case on the assumption that under that contract Goltra had agreed, in consideration of the payment to him by petitioner of the sum of $5,000, to pay the plaintiff the sum of $105,707 in the event he was successful in his claim against the United States. In so holding the Court of Appeals ignored the allegations of the amended petition that (1) petitioner, at the solicitation of Goltra, and because of the friendship between petitioner's president and Goltra, was induced to sell to the Mississippi Valley Iron Company, of which Goltra was the president and controlling stockholder, $163,377 of coke on an open account, which petitioner would not otherwise have sold to that company unless satisfactory credit or security arrangements had been made for the payment of said coke; (2) that petitioner was thereafter induced by Goltra to accept trade acceptances for the coke which it had previously sold to the Mississippi Valley Iron Company on an open account, and that later petitioner was induced by Goltra to exchange and surrender said trade acceptances for $153,000 of the bonds of the Mississippi Valley Iron Company, which bonds petitioner alleged, upon information and belief, were owned by Goltra individually; (3) that by reason of the foregoing there was a moral

obligation on the part of Goltra to protect the petitioner against any loss on said bonds, and which moral obligation he recognized by the execution of the contract of May 6, 1932; and (4) that it was Goltra himself who proposed to petitioner that if it would advance to him the sum of $5,000 to help defray his expenses in connection with his claim against the United States, he would, in the event he was successful in that claim, apply a certain part of any judgment which he should realize on that claim to the purchase of all or a portion of petitioner's bonds.

If those allegations are taken into consideration, then the contract of May 6, 1932, was not one which involved a hazard or a gamble or a lottery, nor did it savor of the character of champerty, as held in the opinion filed. This is necessarily so because petitioner had, prior to the making of that contract, already sustained a loss of $163,377 as a result of having sold coke to Goltra's company on an open account, at Goltra's request. Furthermore, it was **Goltra,** and **not petitioner,** who proposed to make good that loss, in whole or in part, out of the proceeds of any judgment which he might recover on his claim against the United States if petitioner would pay him the sum of $5,000 to help defray his expenses in securing the necessary authorization to institute suit on that claim and in the prosecution of that suit if the necessary authorization was obtained. Under the contract of May 6, 1932 the amount of the net proceeds of the judgment recovered by Goltra's executors on that claim which petitioner was entitled to have applied to the purchase of its bonds was $105,000, which would **still leave a net loss to plaintiff of approximately $63,000** as a result of its dealings with Goltra, not counting at all the loss of interest in a much greater sum. Manifestly, therefore, it was only by ignoring the foregoing allegations of the petition that

the Court of Appeals reached the conclusion that this contract was a wager or a gamble.

Furthermore, the contract of May 6, 1932 was neither champertous nor did it savor of champerty under the Missouri law, as held by the Court of Appeals. Champerty under the Missouri law involves an officious intermeddling by one person in a suit or claim of another. As was said by the Missouri Supreme Court in Curry v. Dahlberg, 341 Mo. 897, 110 S. W. 2d 742, 748:

> "The purpose of the law of champerty and maintenance was to prevent **an officious intermeddling in the affairs of others for the purposes of speculation** or other unworthy motives, and to prevent the strong and influential men of early English times from oppressing the weak."

There was here no intermeddling, officious or otherwise, by petitioner in Goltra's claim against the United States, because, as alleged in the amended petition, it was Goltra himself, and not petitioner, who proposed and offered to apply a certain portion of the net proceeds of any judgment which he might recover against the United States to the acquisition of all or a portion of petitioner's bonds if petitioner would pay him the sum of $5,000 to help defray his expenses in connection with that claim.

Again, the doctrine of champerty has no application where, as here, the claim is against the United States.

In Gesellschaft v. Brown (App. D. C.), 78 F. (2d) 410, 414, the court in that connection said:

> "It follows that contracts for contingent compensation for the prosecution of a debt or individual contract claims against the government, even though they may require legislation and appropriation, and the procuring of legislation granting benefits, where no

other remedy existed for the enforcement of the claim against the government, have been generally upheld. **The old common law rule against champertous contracts has been generally abrogated in the federal courts of this country,** and largely so in the state courts, the equitable and just reason for this advance is comprehensibly stated in one sentence in Wright v. Tebbetts, 91 U. S. 252, 253, where the court said: 'To deprive a claimant of the means of obtaining such professional service would be to deprive him, in many instances, of the means of asserting and enforcing his claim.' "

And in Wardman v. Leopold (App. D. C.), 85 F. (2d) 277, 279, the court also held that the doctrine of champerty was inapplicable in a contingent fee contract of tax experts, who were not lawyers, for a certain percentage of any tax refund which they should secure in the claim of the taxpayer against the United States, and said:

> "We think it clearly appears that the contract here is not one to conduct litigation in the ordinary sense, **but to recover a claim from the government,** and therefore comes within the rule that such contracts are not champertous."

In Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, the court said:

> "Neither the definition of champerty nor the reasons why it was held to be an offense **have any proper application** such as that by which the defendant, under his contract with the plaintiff, sought to **enforce his claim against the Government of the United States.**"

Furthermore, as the contract of May 6, 1932, relates to a claim against the United States, the question whether that contract is enforceable in the Federal Court is not determinable by the Missouri law, as was held by the Court

of Appeals. On the contrary, it is determinable by the Federal law, and the Missouri Supreme Court has so held.

In De Pass v. B. Harris Wool Company, 346 Mo. 1038, 144 S. W. (2d) 146, the defendant contended that a contract under which the plaintiff, a layman, was employed by the defendant to represent it in rate reduction cases before the Interstate Commerce Commission was unenforceable in Missouri because it involved the practice of law by a layman, which was against the public policy of Missouri. The court held that, while it was against the public policy of Missouri to permit laymen to practice law before the administrative tribunals of that State, nevertheless the contract in suit related to proceedings pending before a federal administrative tribunal, and that since the contract was valid under the federal law the Missouri courts had no power or right to refuse to enforce it. The court in that connection said (144 S. W. [2d], l. c. 149):

> "In other words, our statute declares a policy against and makes illegal the practice by laymen before such boards as come within State jurisdiction; but does not affect or declare a policy against any right accorded by valid Federal law. The plaintiff's contract is valid under Federal law and that law is binding on the courts of this State."

Respectfully submitted,

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